

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAY L. SAWYER)	
Claimant)	
VS.)	
)	Docket No. 1,013,804
CENTRAL FREIGHT LINES)	
Respondent)	
AND)	
)	
ROYAL INDEMNITY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the May 16, 2006, Award entered by Administrative Law Judge Steven J. Howard. The Workers Compensation Board heard oral argument on August 8, 2006.

APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Joseph C. McMillan of Lenexa, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

The parties agreed claimant injured his back working for respondent on October 10, 2003, when he was attempting to keep a refrigerator from falling over. In the May 16, 2006, Award, Judge Howard granted claimant permanent disability benefits for a 51.9 percent work disability (a permanent partial general disability greater than the whole person functional impairment rating), which was based upon a 51.5 percent task loss and a 52.3 percent wage loss.

Respondent and its insurance carrier contend Judge Howard erred. They argue claimant should not receive permanent disability benefits for a work disability because claimant injured his back in 1997 and received work restrictions that are similar to those he has now.

Conversely, claimant requests the Board to affirm the Award. Claimant contends he recovered from the 1997 accident as he eventually resumed work as a truck driver and worked for several employers without needing medical treatment or having any back symptoms.

The only issue on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be affirmed.

On October 10, 2003, claimant injured his low back when he was attempting to keep a refrigerator from falling off of a dolly and the appliance fell over on him. The parties agreed claimant's accident arose out of and in the course of his employment with respondent.

Claimant immediately sought medical treatment for his injuries. After a course of conservative medical treatment, including therapy and steroid injections, claimant underwent a discography and a two-level percutaneous discectomy at L4-5 and L5-S1.

After receiving his medical release, claimant did not return to work for respondent as he had been terminated. Claimant made a list of the contacts he had made while seeking other employment, but that list was destroyed in a house fire. The record does not disclose the number of contacts that claimant made or the period of time that his list covered. At the time of his February 2006 regular hearing, claimant had not worked anywhere but he had returned to college hoping to become a dentist. At this time claimant's efforts to find work consist of hiring a headhunter. In the last year claimant has had no job interviews.

The record contains three expert medical opinions regarding claimant's present condition. Claimant's medical expert, board-certified orthopedic surgeon Dr. Edward J. Prostin, examined claimant in November 2004 and concluded claimant was temporarily and totally disabled due to back pain and psychological factors. Accordingly, the doctor strongly urged claimant to see a psychotherapist. At his deposition, the doctor testified claimant should be able to lift 30 pounds occasionally and 10 pounds frequently, if

claimant's psychological problems were addressed. Dr. Prostic also recommended that claimant refrain from frequent bending or twisting at the waist, forceful pushing and pulling, using vibrating equipment, and that he be allowed to change positions for comfort. Finally, the doctor recommends that claimant stand no more than 45 minutes at a time.

The second opinion comes from orthopedic surgeon Dr. Theodore L. Sandow, Jr., whom the Judge selected to perform an independent medical evaluation. The doctor examined claimant in February 2005 and diagnosed chronic lumbosacral strain, degenerative disc disease at both L4-5 and L5-S1, and psychophysiologic somatization disorder. Dr. Sandow recommended that claimant avoid repetitive bending, stooping, twisting, and lifting greater than 20 pounds. He also recommended that claimant avoid prolonged standing and walking. Nonetheless, the doctor believed claimant could work. In addition, Dr. Sandow thought claimant could possibly benefit from psychiatric counseling. But, all in all, the doctor believed claimant had reached maximum medical improvement.

The third and final medical opinion comes from Dr. G. R. Wurster, who performed a psychiatric evaluation of claimant at the Judge's request. Dr. Wurster met with claimant in October 2005 and diagnosed pain disorder associated with both psychological factors and a general medical condition; adjustment disorder with depressed mood; and mild to moderate symptoms of chronic pain, insomnia, and depressed mood with mild to moderate difficulty in social and occupational functioning. The doctor concluded claimant sustained a 10 to 20 percent impairment. The doctor concluded:

Using the Guides to the Evaluation of Permanent Impairment, Fourth Edition, of the American Medical Association as a reference (page 14/301), the most appropriate classification of Impairment Due to Mental and Behavioral Disorders is Class 2: Mild impairment (impairment levels are compatible with most useful functioning). If a numerical percentage of impairment is required, I would assign an impairment percentage of approximately 10% to 20%.¹

Dr. Wurster did not make any treatment recommendations.

But this is not the first time that claimant had injured his back. Claimant hurt his back in 1997 working for another employer. The residual effects of that injury are crucial to this claim.

Dr. Edward J. Prostic examined claimant in April 1998 to evaluate the back pain that claimant developed in 1997 after forcefully pulling on a conveyor. Claimant displayed severe loss of motion and mechanical back pain. Moreover, Dr. Prostic urged evaluation

¹ Wurster Report (Oct. 24, 2005) at 4.

by a psychotherapist. The doctor, however, did rate claimant in 1998 as having a 12 percent whole person functional impairment.

But sometime after that evaluation, claimant's symptoms resolved. Claimant eventually returned to work driving trucks and worked for several different employers after passing the physicals required by the Department of Transportation (DOT). Indeed, in May 2003, claimant passed a DOT physical given by respondent's company doctor, Dr. James Webb. During that examination, the doctor found no range of motion deficit and no tenderness to palpation. Moreover, Dr. Webb placed no restrictions on claimant.

Dr. Sandow reviewed claimant's medical records that pertained to his 1997 low back injury. The doctor indicated he would have a hard time placing claimant in something more than a DRE (Diagnosis-Related Estimates) category 1 for his earlier injury. Consequently, the doctor indicated that all of claimant's present five percent whole person functional impairment as determined under the AMA *Guides*² (4th ed.) is due to the October 2003 accident.

The greater weight of the evidence indicates claimant recovered from the back strain he sustained in 1997. Moreover, the restrictions that were placed on claimant as a result of that injury were unwarranted at the time of the October 2003 accident. Claimant was able to return to work and perform his work duties without restrictions and accommodations. Claimant performed that work without any symptoms and without requiring any medical treatment. But claimant has not recovered from his October 2003 accident. Claimant's ability to work has been severely affected as he now requires hydrocodone daily. Accordingly, claimant is entitled to receive permanent partial disability benefits based upon his task loss and the wage loss that he has sustained.

Respondent and its insurance carrier argue that *Surls*³ requires the Board to deny claimant's request for a work disability. The Board disagrees as *Surls* is distinguishable from the present claim. The critical difference is that Mr. Surls did not recover from his first injury before he sustained his second accident. But in this claim claimant made a complete recovery, passed several DOT physicals, and worked as a truck driver for several different employers before injuring his back unloading a refrigerator.

Judge Howard determined claimant sustained a 51.5 percent task loss and a 52.3 percent wage loss, which created a 51.9 percent permanent partial general disability under K.S.A. 44-510e. The parties do not challenge those percentages should the Board find

² American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

³ *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000).

that claimant is entitled to receive a permanent partial general disability in excess of his whole person functional impairment rating.

Accordingly, the Board adopts the findings and conclusions set forth by Judge Howard and affirms the Award.

AWARD

WHEREFORE, the Board affirms the May 16, 2006, Award entered by Judge Howard.

IT IS SO ORDERED.

Dated this ____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Joseph C. McMillan, Attorney for Respondent and its Insurance Carrier